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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

DANIEL DWAYNE LEWIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

I

Whether the required nexus between premises for which a warrant to search "for evidence" is sought (here for certain described clothes and implements used in the commission of several bank robberies) is satisfied by the naked allegations in the affidavit that a particular individual had been charged with having committed the offenses lived at the residence.

II

Whether the photo-identification procedures used by the FBI were so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification, so much so, that the defendant was denied due process.

III

Whether the defendant's right of confrontation and to the effective assistance of counsel were violated by various indefensible restrictions placed on counsel's efforts to cross examination various prosecution witnesses.

IV

Whether due process considerations were satisfied when the evidence offered to establish guilt was not substantial enough to satisfy the proof beyond a reasonable doubt standard mandated by the constitution.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

_____

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner, Daniel Lewis, respectfully prays that a Writ of Certiorari issue to review the judgment of the Sixth Circuit Court of Appeals, which judgment became final on November

20, 1990 when the Court denied our Petition For Rehearing En Banc.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is set forth at Appendix "A" in the Appendix to this Petition, at page A 1. The Order denying the Petition For Rehearing En Banc is set forth at Appendix "B", p. A 11.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the U.S. Court of Appeals was entered on October 10, 1990. The Order denying a rehearing was entered on November 20, 1990. The jurisdiction of this Court is invoked under Title 28 U.S.C., §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The relevant constitutional and statutory provisions involved in this case are:

1. Fifth Amendment, United States Constitution.
2. Sixth Amendment, United States Constitution.
3. 18 U.S.C., §2.
4. 18 U.S.C., §2113 [a] and [d] [1982].
5. Rule 29(C), Federal Rules of Criminal Procedure.
6. Rule 401, Federal Rules of Evidence.

STATEMENT OF THE CASE

Daniel Lewis, the petitioner, and one Rodney Radford were charged in Count I of the Indictment with conspiracy to rob the Star Bank in Columbus, Ohio in violation of 18 U.S.C., §2113 (a) and (d).

Count II charged the same defendants with the substantive offense

of having actually robbed the Star Bank in violation of 18 U.S.C., §2113 (a) and (d). Next, Count III also charged, with reference to the above robbery, that the petitioner did "carry a firearm" in connection with the alleged offense. And, in Count IV, the charge was that on May 19, 1989, Daniel Lewis, Rodney Radford and another man robbed the Park National Bank in Newark, Ohio -- another violation of 18 U.S.C. §2113 (a) and (d) and §2.

The final charge, made in Count V, was that Daniel Lewis carried a firearm during the commission of the offense in violation of 18 U.S.C., §2113 (a) and (d). (See Tr., Vol. I, pp. 10-14.)

The petitioner was tried and convicted in the United States District

Court for the Southern District of Ohio on counts I, IV and V. The jury was unable to reach a verdict on counts II and III. This inability resulted in the declaration of a mistrial on those counts Subsequently, these two counts were dismissed on the government's motion pursuant to Rule 48 (a), Federal Rules of Criminal Procedure.

I

Prior to the commencement of trial on the merits, the Court considered the defendant's "Motion to Suppress". Counsel for the defense in outlining his position in connection with this Motion to Suppress (Tr., Vol. I, p. 90) observed that:

> I would like to bring to the attention of the Court that Danny Lewis was arrested at approximately 11:30 a.m. on June 13, 1989, pursuant to an

arrest warrant. This was based upon a criminal complaint sworn to on June 12, 1989, and he was arrested for the robbery of a bank known as the Star Bank. This occurred on or about March 15, 1989. Initially, that was all he was arrested for.

Approximately five hours after the arrest, the FBI tells me they procured a search warrant, executed the search warrant at that time.

We then find that he has a second warrant, second complaint was filed on June 19, 1989, and that was after the search warrant was executed and that was for the Park National Bank.

***

I think we would like to bring up that the search itself, I feel, is based upon the March 15 robbery and if they are going in to search a home on June 13, I believe it is rather stale under any consideration whatsoever as far as time.

Id., 91-92.

Also, counsel argued that simply because the government may have had probable cause to arrest the defendant on "June 13, 1989" for a robbery that occurred on "March 15, 1989", this fact does not alone furnish "probable cause" to believe his "residence would be a depository for contraband" (id., 94). And, counsel argued that the search of the safe found on the premises, which search revealed money ultimately linked to one of the robberies in this case, could not be justified on any legal basis.

II

On March 15, 1989, the Star Bank was held up by two men. According to **Michael Parson**, the branch manager, he was accosted by two men in a silver car

in the parking lot of the bank (Michael Parson at Tr., Vol. 1, p. 149). The passenger who he identified as defendant I (id., p. 217), brandished a gun and escorted him into the bank. (id., p. 151-153). The driver never exited the car (ibid).

Once inside the bank, Parson testified the gunman put on a ski mask and asked about the all-clear signal. This was a signal to later arriving employees that it was safe to enter the bank. (Id., p. 155.) His evidence also showed the main vault would not open without two combinations; to wit, his combination and that of the head teller. Parson reported that the robber was early to mid 20's in age (id., p. 207); and on cross-examination testified that

the robber had no facial hair. This was a direct contradiction to the previous testimony of FBI Agent Coghlan, who had relied on descriptive information supplied by Parson in the composition of the photo array used as an aid in facilitating Lewis' identification (id., p. 110).

Next, Parson credited the robber with having stated that he did not want any dye-packs included in the money (id., p. 170). Parson then testified he obtained the license plate number of the robber's car and reported it as being 837 MFA (id., p. 177). A total of eleven thousand, nine hundred sixty nine dollars ($11,969.00) was stolen from this bank.

Beth Lovsey, the head teller at The Star Bank, who entered while the gunman was hiding inside the bank, never saw either robbers' face. Additionally, her testimony showed she provided the local police with a written account of the events (Beth Lovsey at Tr., Vol. I, p. 239).

III

Some weeks later, the Park National Bank was robbed of almost one-half million dollars (William Wilson at Tr., Vol. III, p. 89). This robbery was committed by anywhere from two (2) to four (4) men depending on whose testimony is believed. Essentially, two well-dressed men accosted three (3) bank employees in the parking lot and escorted them into the bank (Linda Gray

at Tr., Vol. II, pp. 2-9). Once inside the Bank **Linda Gray**, who was the head teller, was escorted to the main vault by one of the gunmen. The other robber tied up the other employees then present, as well as, each person who entered the bank thereafter.

According to Gray, although she failed to pick the defendant's photo from the array; her description of the robber included a report of no facial hair. Indeed as shown below, another of the eyewitnesses, Angela Camarata, specifically identified Bernard Turner as the man who got her out of her car and tied up the employees (Angela Camarata at Tr., Vol. II, p. 76). Significant here, Bernard Turner who was likewise indicted, had the charges

against him dismissed.

This interesting fact must be weighed with the fact that Daniel Lewis only became a suspect because of his friendship with Turner. Further, it was the defendant's contention throughout the trial that Bernard Turner and Devon Hall committed these offenses. (See, Tr., Vol. III, pp. 54-58.) And, it was shown that seventy three thousand dollars ($73,000.00) of the money taken in the Newark robbery was recovered in a search of Loretta Robinson's home (id., p. 56). Loretta Robinson, in turn was revealed to be the girlfriend of Devon Hall (id., p. 57). Even this is not all, according to our petitioner, it was Devon Hall who placed a package, later found to contain some of the

stolen money, in his (i.e., the petitioner's) safe (Daniel Lewis at Tr., Vol. III, p. 199).

Of no mean significance here, the defense sought to develop this theory at trial and show the defendant had been misidentified. To this end, the attempt was made to show that Bernard Turner was an original suspect and that his charges had been dismissed. The attempts failed after the Court ruled, actually more than once, that no mention could be made of Turner's indictment or the dismissal (Tr., Vol. II, p. 79). Here the Court punctuated his forcible ruling in this regard with the command statement "[d]o you understand" (ibid).

While **Linda Gray** certainly was one who had as good an opportunity to view

the robbers as did those who made identifications, she specifically "did not remember any of the robbers having facial hair" (Linda Gray at Tr., Vol. II, p. 37). Indeed, this witness' familiarity with the robbers was such that she actually "helped the police or FBI" make a composite (id., p. 41 & 48).

What is most significant then is that although Linda Gray was shown pictures several times by officers in quest of an identification, she was unable to identify Daniel Lewis as one of the robbers from the pictures shown her. (Linda Gray at Tr., Vol. II, pp. 43-44). She did, however, identify him in Court as one of the robbers (id., pp. 28-29).

Angela Camarata, another bank employee, testified the robbers did not have any "facial hair" (Angela Camarata at Tr., Vol. II, pp. 65, 71 & 75). She was shown pictures and a composite of a man with a mustache but specifically told the police the robber had no mustache (id., pp. 72-73). This witness was only able to identify Bernard Turner (id., p. 76). Specifically, Camarata identified Bernard Turner as the man "who took her out of the car" (id., pp. 76, 77-78). This was her only identification.

Of ..o mean significance here, hence it is worth emphatically repeating, the Court barred the defense from bringing out (during this witness' cross examination) the fact that although this

identification was made and Turner was indicted, the indictment against him was dismissed (id., p. 79). Despite this indefensible ruling this witness admitted on cross examination by counsel for defendant Lewis that she identified two people, but neither of them were the people on trial (id., pp. 90-91).

Carol Brunton, another employee, testified to being victimized by the robbers. She identified Daniel Lewis, in court, as the person who "came to ... [her] car" and asked her to get out (Carol Brunton at Tr., Vol. II p. 97). According to this witness Daniel Lewis was the person who went to the lobby (id., p. 100).

This witness also claimed to have suffered bruises from the tape used to

tie her (id., p. 106). A lot of photographs were shown her by Agent Coghlan (id., p. 107). She was told to "initial the back of any photo identified" (id., pp. 107-108). These photographic displays occurred on June 15, 1989 (id., p. 108), several days after Lewis was arrested. While Brunton looked at the pictures "two or three times" (id., p. 127). She "did not recognize any" person in the sets she was shown. The fact that her quest was to identify the person "that had gotten" her out of the car (id., p. 129) makes her inability to identify Daniel Lewis as one of the robbers a most significant fact.

Next, Brunton was shown some larger pictures and some close ups (id., pp.

129-130). She was also shown pictures a third time.

Distilled her testimony showed that after she finally picked Lewis' picture the first time, she was shown his picture again and then shown a larger picture of him (id., p. 131). While this witness could not recall if she told the police the man she identified had facial hair (id., p. 182), she did recall being unable to give the police any help in their efforts to develop a composite sketch (id., pp. 125-126).

Miss. Tamarah Weiner made an identification of exhibit 43, the photo of this petitioner. Of considerable significance here, her evidence showed the FBI agent repeatedly showed her the picture of the defendant. Here our

reference is to Miss. Weiner's testimony that she was first shown four (4) photos (Tamarah Weiner at Tr., Vol. II, p. 159) in which Lewis' photo appeared. She made an identification from this group. (Ibid.) She was then shown photos on "3 or 4" additional occasions (ibid). The defendant's picture was repeated in these subsequent showings. Proof this is so is her testimony that while she did not "remember every single picture, ... [she] believe[d] they were the same photos" (id., p. 160).

Other significant testimony from this asserted eyewitness showed her stating at one point: "I picked a picture I thought in my mind was one of the intruders;" and that she merely "felt" her identification was accurate

(id., p. 163). Also, this witness was never asked to view a lineup (id., p. 165).

Kelly McCullough the assistant head teller of the Newark Bank, was only able to testify to certain movements made by some of the intruders. She "never saw a person without a mask on" (Kelly McCullough at Tr., Vol. II, p. 191) and admitted she would not be able to make an identification (id., p. 190).

Despite this witness' expressed inability to identify any one, the authorities nonetheless persisted in showing her pictures. While she could not remember the number of times this happened, she estimated "maybe four different times" (id., pp. 197-198). Here too, it is significant that the

Court barred the defense from asking this witness any questions relevant to the various pictures she was in fact shown.

As to this effort, counsel argued that his purpose was to show, with all witnesses (those who made identifications and those who did not) "the entire array ... [was] suggestive and the methodology" was flawed (id., p. 201). In the Court's view, inasmuch as this witness did not identify anyone, nothing else was relevant (id., p. 201).

Richard Baker, the manager of the Newark Bank, testified to likewise being present during the robbery. Baker identified Lewis' photo from Exhibit 43. This witness' evidence shows that when

originally shown the photos, his first reaction was that of indecision. (See Richard Baker at Tr., Vol. II, p. 210).

On cross examination Baker admitted the only "area of the man's face ... [one] could see" was from midnose to eyebrows (id., p. 216). Indeed, he admitted to not being able to see the color of the man's eyes. Yet he professed knowing even then he could make an identification "from the eyes" alone (id., p. 216), which was the only distinguishing feature that supposedly could be seen (id., pp. 216-217).

This point was magnified by Baker's testimony that he was unable to report to the police anything about the height or weight of the robbers (id., pp. 219-220). It is further punctuated by the

fact that he was not able to identify any one from the first set of pictures shown (id., pp. 221-222).

While typically there was no recording of the reactions of any of the witnesses to the pictures shown them, Baker admitted vacillating over the pictures shown him. He recalled saying certain photos "could resemble him and just as anybody else would looking through the pictures and finally I said this is it" (id., p. 222).

Thus, it seems clear enough this witness merely picked the picture in the group that came closest to his recollection of the robber. (See Richard Baker at Tr., Vol. II, pp. 222-223).

Also it is important to note, this witness originally reported to the

police, indeed on the day of the robbery, that the robbers "wore stocking masks" (id., p. 224). This statement impeaches, and otherwise confutes, his testimony about being able to see the eyes of the robber he identified this defendant as being (id., p. 208). These eyes were described as "very distinctive eyes, big eyes" (id., p. 208). And, as shown above, this witness' identification of Lewis was solely on the basis of his eyes (id., p. 216).

FBI Agent **Phillip Coghlan** provided evidence showing he was notified on the day of the robbery of the Star Bank of that event (Phillip Coghlan at Tr., Vol. III, p. 25) and on that date, March 15, 1989, he commenced his investigation (id., p. 26). On March 19, 1989, he

learned of, and started his investigation of, the Park National Bank robbery (ibid).

Coghlan testified that on June 9, 1989 he showed Mike Parsons, the manager of Star Bank (the Columbus Bank), exhibit 43, which contained a picture of Daniel Lewis, this appellant (id., pp. 30-31). Parsons was credited with making an identification at that time (id., p. 31). This witness then testified that he showed these same photos to Miss. Brunton (of the Newark Bank) who likewise identified Daniel Lewis' picture (id., p. 31). In turn he showed exhibit 43, containing Lewis' picture, to Tammy Weiner (id., p. 31), who identified Lewis (id., pp. 31-32).

Coghlan testified, despite defense objections (based on the suppression arguments [id., p. 33]) that a search of Lewis' home on June 13, 1989, revealed currency in the amount of eighteen thousand, three hundred eighty eight dollars ($18,388.00) (id., p. 35). These funds were identified as arguably having been proceeds of the Newark robbery.

Coghlan confirmed that although Linda Gray positively identified Daniel Lewis as one of the robbers, she had been shown his picture on "different" occasions and had failed to identify him from the photo arrays (id., p. 49).

His evidence also showed that Lewis was identified by "Tamarah Weiner on 6-21-89, Mike Parsons on 6-9-89, Carol

Brunton on 6-15-89 and Rick Baker on 6-15-89" (id., p. 60). Given the above dates and the fact that Lewis was arrested on June 13, 1989; no justification for not holding a lineup, except to deprive him of the presence of counsel, can be offered.

IV

Counsel opposite, for reasons that hardly make sense, objected to defense counsel "referring to any photograph arrays" that did not include the defendants on trial (id., pp. 50-51). While the Court's ruling is not at all clear, it was made despite Lewis' trial counsel having made the distinct point the identification issues went "right to the crux of the matter" before the Court and jury (id., p. 51). In emphasizing

his point, despite the Court's obvious dissatisfaction, counsel was able to point out the significant fact that the affidavit of Agent Coghlan showed "[a] photograph of [Bernard] Turner was displayed in a six-man photo spread and he was positively picked by a victim teller." It also showed that "Turner matched the physical description of the robber and is a known associate and former roommate of Lewis." (Tr., Vol. III, pp. 51-53.)

Despite this the Court made the following emphatic ruling:

> THE COURT: I told you I am not going to let you get into any legal proceedings against Mr. Turner. That is not relevant. The identification of Mr. Turner is perhaps, and I had indicated before that I would let you pursue that.

(Tr., Vol. III, p. 55).

The cogency of the above observations made by counsel for the defendants make it manifest that this Court must credit the contentions put forth by them. The upshot of such consideration will inevitably lead to the conclusion that our petitioner was grievously wronged by the trial Court's unwarranted restrictions.

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

This case marks the third time this counsel brought to the attention of the Sixth Circuit Court of Appeals and this Court the wilfully defective way FBI agents have been allowed to affirmatively manipulate the ability of eyewitnesses to bank robberies to render identification testimony. Here our reference is to United States v. O'Neal,

496 F.2d 368 (6th Cir. 1974) and United States v. Batin (unreported) 87-3850/3851 (Dec. 1988); _____ U.S. ____, 109 S. Ct. 1652 (1989).

Thus it is significant here that the FBI, in our area, doubtless made the conscious decision not to pay any heed whatsoever to the notion that "it is preferable for law enforcement officers to use a line-up rather than a photographic identification when the suspect is available," the case here. Batin, at p. 12 (citing United States v. Marchant, 564 F.2d 983, 995 [2d Cir. 1977] and United States v. Allison, 616 F.2d 779, 783 [5th Cir. 1980]).

Thus the contention is made here that the identification testimony here clearly failed to provide the persuasive

force required for a determination that the petitioner was indeed guilty. An aspect of this contention is that clearly the identification testimony should have been excluded on the petitioner's motion.

It is also being contended herein that the Court erred in denying the petitioner's Motion to Suppress. As shown below, not only was the affidavit facially insufficient for its failure to set forth probable cause, the seizure of the money from the safe found in the home of the petitioner cannot be justified on the basis of any known tenet.

ARGUMENT NO. I

Due Process And Fundamental Criteria Require A Court To Suppress And Exclude As Evidence Property Seized On The Basis Of A Warrant Where The Affidavit

Therefor Fails To Set Forth Probable Cause.

In this case the affidavit relied on for the search warrant simply stated that two bank robberies (on March 15, 1989 and May 19, 1989) had been committed in the Southern District of Ohio, that this petitioner had been "arrested by the FBI" (as he was on June 19, 1989) and had appeared before the Magistrate and that he lived at the place for which the warrant to search was being sought. The affidavit described the clothing "worn by the robber in the May 19 robbery". Also there was a description of the "weapons used."

Significant here, there was nothing in the Affidavit that could be regarded as a substantial basis for any belief

that any of the evidence sought by the warrant would be on the petitioner's home premises (ibid).

Of course, it cannot be denied the warrant itself purported to authorize a search for, inter alia,

> Bank currency, identified as bait money, including bank wrappers and any other identifiable bank materials of Star Bank and/or Park National Bank.

Almost at once several critical issues surface. These include the dispositive query as to whether the affidavit sets forth probable cause to search for anything at this home. Additionally, the particularity requirement of the Fourth Amendment, with reference to the generically described "Bank money," was not set forth therein. The upshot of this is

that the officer not having any way to differentiate between any possible stolen money and other money found on the premises is the significant circumstance. In short, the money designation used was insufficiently particular to satisfy the constitutional requirement. See United States v. Buck, 813 F.2d 588, 590-591 (2d Cir. 1987) and United States v. Young, 745 F.2d 733, 759 (2d Cir. 1984).

Finally, there is the issue as to whether the seizure here could possibly be qualified under the plain view doctrine -- assuming, of course, that possible contention was not waived by the government.

(A)

The search warrant affidavit, relied on for the issuance of the warrant, was

facially insufficient to support any finding of probable cause.

Counsel for Lewis made the valid contention at the trial level that merely because one is arrested for bank robbery does not automatically justify a search of his home for anything. In taking this position he, of course, was making the same point made in Steagald v. United States, 451 U.S. 204 (1981). There this Court indicated an arrest warrant "serves to protect an individual from an unreasonable seizure". And, that by contrast a search warrant "is issued upon a showing of probable cause to believe that the legitimate object of a search is located in a particular place, and therefore safeguards an individual's interest in the privacy of his home and possessions against the

unjustified intrusion of the police." (id., at pp. 221-213).

Here, of course, the central issue, simply put, is concerned with whether probable cause automatically exists to search the home of one lawfully arrested (on June 13, 1989) for a bank robbery (committed on May 19, 1989).

Obviously our contention is that a nexus is required between the bank robbery and the premises here involved. Now, we do concede this issue is controlled by the general search license given in Illinois v. Gates, 462 U.S. 213 (1983). But even Gates makes the point that the Magistrate's task includes making the required determination that "given all the circumstances set forth in the Affidavit ... there is a fair

probability that ... evidence of a crime will be found in a particular place" id., at p. 238. Even with this very liberal test as our guide, we are limited to considering the fact of Lewis' arrest, the location of his residence and the fact of the bank robbery -- weeks before.

Missing then, from the affidavit, is any reason (including the required substantial reason) to believe the property described, or any of it, would be at the petitioner's home. Stated another way, and in the words of Gates, the affidavit failed to provide the Magistrate with a "substantial basis" for concluding that probable cause existed to support a belief that any of the denominated property could be

located on the premises.

Even this is not all, it should be specifically noted that nowhere in his Affidavit did the affiant indicate why he believed that any of the property sought could even possibly be located on the premises. Simply put, he did not indicate, e.g., that in his experience bank robbers usually kept the tools used, and profits from, their recent efforts in their homes. Cf., United States v. Batchelder, 824 F.2d 563 (7th Cir. 1987), where the Court credited the affiant's representation, based on his experiences, that the items sought by the warrant were almost always purchased for personal use and stored in the purchaser's home (id., p. 564).

The absence of any comparable allegation here is really conspicuous. Also see United States v. Scott, 555 F.2d 522 (5th Cir. 1977), where the Court credited the naked recitation in the affidavit that "in the experience of the affiant, persons engaged in illegal numbers lotteries usually kept lottery items in their headquarter residences...." Id., at 526.

The upshot of our contention here is that inasmuch as the warrant simply failed to set forth probable cause for a search, the evidence seized in the wake thereof should have been suppressed.

(B)

Given the imprecise description, "bank money," any authority granted by the warrant to seize any money (indiscriminately, as was done, or

otherwise) must be viewed as being invalid.

Here it should suffice to simply note that the particularity requirement in the Fourth Amendment does not exist in a vacuum. Hence, apart from any defective description of the property sought by the warrant, the affidavit must set forth a basis for the authorization. The affidavit here obviously fails to satisfy this basic requirement.

Now the contention could very well have been made that in any event the money was in "plain view". The short response here, of course, is provided by Arizona v. Hicks, 480 U.S. 32 (1987). Apart from the sophisticated argument that the plain view doctrine does not apply because arguably the officers

planned to look for money, the government cannot satisfy the "immediately apparent" aspect of the required test.

Obviously the test here being referred to is one that must be reckoned with. Indeed, in United States v. Szymkowiak, 727 F.2d 95 (6th Cir. 1984), our Court delineated the contours of the plain view doctrine in ways that clearly require the exclusion of the money seized herein.

For these various reasons, the conclusion is irresistible that the Court erred in not suppressing the evidence seized from the petitioner's home. The devastating impact of proof showing money taken from the Bank was found in the petitioner's home, standing

alone, is incalculable. The same is true of its impeachment worth insofar as Lewis' credibility and overall defense was concerned.

ARGUMENT NO. II

Where, As The Evidence Here Shows, The Identification Procedures Resorted To By The FBI (And Local Police) Was So Impermissibly Suggestive As To Give Rise To A Very Substantial Likelihood Of Misidentification, A Guilty Verdict Based On Identification Testimony Developed As A Product Of Such Procedures Cannot Be Squared With Due Process.

The Record shows critical segments of the descriptive data given by the various eyewitnesses to the charged offenses not only failed to match the petitioner's actual description, it did not even come close. For in addition to the fact that there is serious conflict as to whether the robbers' faces could even be seen, none of the descriptions

credited the person, in whose place Lewis was convicted, with having a mustache.

Here, we emphasize the testimony of Linda Gray and Richard Baker, as being illustrative of the effectiveness of the identification procedure used. For not only did these identification witnesses fail to attribute to Daniel Lewis any facial hair, neither of them were able to readily pick his picture in a manner that indicated they had a firm recollection of the particular robber in whose place he was selected. Indeed Linda Gray, despite a number of repeat showings, never was able to identify a picture of Daniel Lewis. And, as shown above (ante, pp. 10-11), Richard Baker's evidence was obviously the product of a

process of elimination.

The fact that these episodes were orchestrated by the FBI is hardly something that should not be reckoned with. Cf., United States v. O'Neal, 496 F.2d 368 (6th Cir. 1974).

Our faulting the FBI agent for repeatedly showing pictures of Lewis, particularly after his arrest, rather than conduct a lineup, really cannot be over-emphasized. For it is obvious the agent, rather than seek to challenge these witnesses to make positive identifications in the fairest possible way, cleverly facilitated and, indeed, manipulated the witnesses' identification of Daniel Lewis.

This follows because it is really clear enough, particularly to anyone who

is in any way aware of problems with eyewitness testimony, that the procedure used by the agent in this case made it all but inevitable that Daniel Lewis would be identified. Simply put, the agent's persistence in getting an identification of Daniel Lewis was most obvious. Indeed, it became manifest to those who were asked to make an identification that the agent was convinced that one of those whose picture was being presented was indeed the one the agent was fully convinced was one of the robbers.

Given this indelible, and inconfutable, circumstance the Sixth Circuit's inferential conclusion that the in-court identification (here being centralized) had the reliable and

independent basis required, by Manson v. Brathwaite, 432 U.S. 98, 114 (1977), cannot be squared with reality.

The bottom line then is Linda Gray's frequent passovers of Daniel Lewis' photographs and Richard Baker's ultimate selection of Lewis' photo (in the method described) translates into an identification episode that was truly inundated with special elements of unfairness.

Other points of critical significance here that must be dealt with turn on the fact that some of the photo identifications made here were made after the petitioner had been formally charged and arrested. The effect of this is that if a lineup had been conducted, due process would have

required that the petitioner be allowed to have counsel present or that he waive counsel's presence. See Kirby v. Illinois, 406 U.S. 682 (1972). This follows because clearly with the formal charge that had been lodged against the petitioner, this fact must be regarded as the initiation of formal judicial proceedings.

With this fact as a given, the question then is whether it was a due process violation for the agent to consciously avoid, as he obviously did, utilizing the lineup procedure to garner and solidify his identification evidence.

In making this contention one must credit the fact that the dangers are inherent in eyewitness identification

testimony. The upshot of the point here being urged is that this Court has clearly accepted the argument that eyewitness identification testimony is not as reliable as the Court had once assumed.

Here it can hardly be denied that showing the various witnesses pictures of the petitioner after he had been arrested was calculated to insure the presence of elements of fairness in the procedure used. Nor can it be said that it was designed to provide the accused a heightened level of due process. Actually the reverse was true.

Here, of course, we deal with the obvious fact that none of the eyewitnesses described the robber, in whose place the petitioner Lewis was

convicted, as having any facial hair. And, the facts here show the petitioner Lewis had facial hair of a quality that surely would have been described if indeed he was the robber. Our reference is to the very prominent mustache as shown in the exhibit identified by the various witnesses -- to whom reference has been made.

The effect of this is that the totality of the circumstances here shows the FBI agent had to be aware (or should have been aware) that if indeed Lewis was one of the robbers he [Lewis] did not fit the prior descriptions that had been furnished him. So postured, the possibility cannot be overlooked that those who later identified this petitioner's picture were influenced by

the certain fact that other fellow employees had been able to make identifications from the pictures shown them. This obviously was a fact that simply was not concealed.

Next, the fact that Linda Gray could not identify the petitioner from any of the pictures shown here makes it obvious her in-court identification was, and is, most unreliable. The same unreliable label fits well the identification made by Richard Baker, the manager of the Newark, Ohio Bank. His testimony that the identification was made on the basis of the eyes only, which had to have been seen (according to his original description) through a "stocking mask" hardly makes any sense at all. Indeed, his original selection

of the photograph of Lewis, which clearly was by a process of elimination, makes it at once manifest his identification testimony was unacceptable.

Simply put, there is a discernible progression in the level of certainty from the point when the original descriptions were furnished by these two witnesses through their various viewings of the pictures to their positive identifications in Court. In our judgement this rising level of positiveness, or certitude, reinforces the conclusion that their identification testimony was more a product of subtle prodding by the FBI agent than it was an indication of reliability such as is required by Manson v. Brathwaite, supra.

Additionally, it makes it all the more manifest that the petitioner should have been placed in a lineup.

All this being so, this Court should credit the point made in Manson v. Brathwaite, that a witness' recollection of ... [a] stranger can be distorted easily by circumstances or by later actions of the police" (432 U.S. at 112). This follows because obviously this is what occurred here -- and deliberately so. Cf., Foster v. California, 394 U.S. 440 (1969), where, not unlike what occurred here with Linda Gray, the officer kept exposing the accused to the witness in hope that eventually an identification would be made, and it was.

In Foster the Court ruled, and should do so again, that such an identification procedure as a matter of law was so defective as to render the resulting identification constitutionally inadmissible.

The bottom line here is, the conclusion about the identification made by these two witnesses is not supported by any facts suggesting reliability. This being so, it is an inescapable conclusion that the suggestiveness in the procedures used by the agents in the creation of their identifications of Daniel Lewis cannot possibly be said to have been outweighed by any reliability factors.

ARGUMENT NO. III

Due Process, A Defendant's Right Of Confrontation And His Right To The Effective Assistance Of Counsel Are All

Grievously Violated When A Trial Court Places Arbitrary And Indefensible Restrictions On, And Otherwise Interferes With, A Defense Cross-Examination Of Identification Witnesses.

The basis of the trial court's refusal to allow the defense to make inquiry of various witnesses is, of course, indefensible. This is particularly so with reference to the fact that a named suspect (i.e., Bernard Turner), who was specifically identified and charged with some of the offenses here involved, had his case dismissed in spite of this positive identification. Here, certain tenets seem especially compelling. First, we have Flowers v. Ohio, 564 F.2d 748 (6th Cir. 1977). There the Court reasoned that any limitation on defense cross examination designed to develop the fact that a

misidentification may have been made was a constitutional error. Even this is not all. This same Court, in rejecting the apparent notions of our trial judge, precisely concluded that the jury was entitled to any evidence bearing on "the credibility of the in-court identifications" (564 F.2d, at 750).

Next, it was indeed contended below, and is being contended here, that where a conviction must turn substantially upon the identification of the defendant as the guilty actor, any unreasonable limitation upon the defendant's right of cross examination is prejudicial. Again, our reference is to the Court's unwillingness to allow various witnesses to be examined in a way that showed the dismissal of the

indictment of Bernard Turner.

Inasmuch as this Court has repeatedly held that reliability is the critical factor as to any identification evidence, it necessarily turns on the totality of all the circumstances surrounding the identification evidence itself. This being so, any and all facts relevant to the appropriate inquiry would be proper for the jury's consideration. Thus the flaws here become magnified when they are viewed in the light of the fact that counsel sought to emphasize his position by resorting to the various cogent arguments set forth elsewhere in this Petition.

Since the defense's need for the excluded evidence was both

particularized and made known, it is a valid argument that the restrictions the trial court placed on the defense efforts at cross examination (of the eyewitnesses to these crimes) actually deprived the jury of critical evidence relevant to any meaningful evaluation of the reliability of their identification testimony and their credibility as witnesses. So postured, the action of the trial court in this case amounts to far more than a mere abuse of discretion. Simply put, it resulted in Daniel Lewis being denied due process itself.

Again, the defense sought to develop facts relevant to the charging of Turner and the dismissal of his charges. In our judgement, as will be

confirmed by the arguments made below, this evidence was admissible, both, under the Federal Rules of Evidence, and by virtue of the right an accused has to produce evidence in support of their defense. See Chambers v. Mississippi, 410 U.S. 284 (1973) and Washington v. Texas, 388 U.S. 14 (1967). On this point, it should be noted the defense, first of all, fully complied with the rule that requires, as a condition precedent to an appellate review of a trial court's exclusion of evidence, a proffer be made. The proffer made in this contention is fully articulated in the Record at Tr., Vol. III, p. 55.

Next, our basic contention is that due process and integrity of a criminal trial were offended when the trial court

excluded relevant evidence (herein what amounts to the positive identification of another party as the perpetrator) since there was present more than sufficient indicia of the trustworthiness of the evidence involved.

What has been said above confirms the idea that "few rights are more fundamental than that of an accused to present evidence in his own defense." Chambers v. Mississippi, supra, at p. 302. It also confirms, unless the reasons for the exclusion of this evidence were valid, that Daniel Lewis was indeed deprived of needed substantiation for his own defense. For it can hardly be denied his defense was "far less persuasive than it might have

been" had the excluded evidence been admitted. See Rule 401, Federal Rules of Evidence. Also see, United States v. Partin, 493 F.2d 750, 763 (5th Cir. 1974).

Obviously, the questions that emerged from this format must be resolved in the wake of reasoning patterns that accommodate the impact of the right of an accused to present evidence in his defense and his right to a fair trial. For our part, the summary and abruptly manifest disposition of this issue by the trial judge verifies and underscores our belief that, like the prosecutor, the judge really did not understand the contentions bearing on this issue as postured by the peculiar facts in this case.

In any event, our due process contentions are that the defense was deprived of evidence that clearly bore on the accuracy of Lewis' identification as one of the robbers. On this point the cases of Chambers v. Mississippi, supra, and Green v. Georgia, 442 U.S. 95 (1979), are most significant.

Again, for emphasis this time, the constitutional right violated was the right to present a defense, which right is guaranteed by the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. It should also be noted that although these constitutional claims were not specifically asserted, the Court's exclusion of this evidence for the reasons stated cannot be defended.

Granted, a trial court can condition the right of the defendant to present evidence on reasonable rules of evidence and procedure designed to further legitimize the government's interest in the fairness and reliability of the trial process (Chambers v. Mississippi, 410 U.S. 284 [1973]). However, when the Sixth Amendment right to present exculpatory evidence is the issue, to overcome the claims of the defendant it is not enough for a trial judge to simply rule against admission because of his apparent preference for the argument of the government (regardless of its absurdness) against admission. Yet this is what occurred here.

ARGUMENT NO. IV

Where, As Here, The Guilty Verdicts, Rendered By The Jury, Are Insufficient As A Matter Of Law Because Of The Lack Of Sufficient Evidentiary Support, Due Process Requires That Such Verdict Must Be Reversed.

The constitutional requirement of proof beyond a reasonable doubt to support a verdict of guilty is really beyond dispute. Hopefully it will endure despite its almost fatal subsumation in the pernicious harmless error concept.

In this case, if the Court agrees that the search warrant was issued in defiance of the constitutional requirement of probable cause, any view of the evidence in this case without the benefit of the Bank money, found in the petitioner's home, would surely not raise even a close sufficiency question.

Indeed, the contention is here being made that the evidence would then clearly be insufficient to support any of the guilty verdicts returned herein.

While the insufficiency would certainly be clearer if the bank money evidence is excluded, even with that evidence, and with the Court viewing all the evidence in the light most favorable to the jury's verdicts, this case should nonetheless be reversed because of the lack of substantial evidence in the record to support it. Glasser v. United States, 315 U.S. 60, 80 (1942). Also see Jackson v. Virginia, 443 U.S. 307 (1979) and In Re Winship, 377 U.S. 358 (1970).

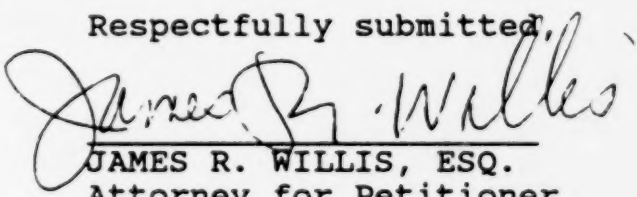
The above suppression arguments apply with equal cogency to the state of

the record if this Court concludes the identification testimony was unreliable -- regardless of the reason.

CONCLUSION

The issues raised in this Petition are all significant and certainly are of sufficient worth, that their resolution in favor of the petitioner would not merely entitle him to a new trial, but final judgment in his favor. For if the Court agrees the Motion to Suppress should have been granted, no other final resolution would make any sense. The same would be true if our identification arguments are fully credited.

Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition For Writ Of Certiorari was mailed to the office of Salvador A. Dominguez, Esq., Assistant United States Attorney, 85 Marconi Boulevard, Room 200, Columbus, Ohio 43215, this _____ day of February, 1991.

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A P P E N D I X

No. 90-3072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DANIEL D. LEWIS,

Defendant-Appellant

On Appeal from the United States District Court for the Southern District of Ohio.

BEFORE: KENNEDY and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

PER CURIAM: Defendant Daniel Lewis appeals his conviction for conspiracy to commit armed bank robbery, armed bank robbery, and carrying a firearm during a violent crime. Lewis makes several arguments on appeal: (1) evidence seized pursuant to an improper search warrant was improperly admitted; (2) FBI identification procedures were

improperly suggestive; (3) the trial court improperly restricted cross-examination; and (4) there was insufficient evidence to support the verdict.

On March 15, 1989, the Star Bank in Columbus, Ohio, was robbed. The manager of the bank, Michael Parsons, testified that when he arrived at the bank that morning he was confronted by an armed man who exhibited knowledge of the bank security system and the bank employees. Parsons later identified defendant Daniel Lewis in a photo array as that armed man. On May 19, 1989, the Park National Bank in Newark, Ohio, was robbed. The robbery was conducted in a manner similar to the Star Bank robbery. Following Parsons' identification of defendant, the FBI obtained a warrant to

search his house. The search revealed $18,388, mostly in consecutively numbered bills.

On July 13, 1989, Lewis was indicted on five counts relating to the two bank robberies. He was convicted on three of the counts, all relating to the robbery of the Park National Bank. The District Court declared a mistrial on the two counts on which the jury could not agree.

At trial, several witnesses identified defendant as one of the robbers of the Park National Bank. Another witness could not identify defendant, but did identify another person as one of the robbers. In addition, there was evidence that defendant had access to the security information needed to commit the

robbery, and that he had recently made large cash purchases.

Defendant contends that the evidence obtained from the search of his residence should have been suppressed because the search warrant was improperly granted. The affidavit used to obtain the warrant stated that defendant had been identified by one of the witnesses. The warrant specifically provided for a search of defendant's residence for evidence of the robberies, including bank currency, bait money, and bank wrappers. Those materials were properly seized under the warrant. The agents did not need to provide a particular reason for searching defendant's home for evidence of the robberies. Defendant had been identified as the bank robber, and had

ample opportunity to return to his home and deposit evidence there. That was enough to establish probable cause to believe that there was evidence of the robberies at his residence.

Defendant also argues that the agents acted improperly when they opened a safe during their search. This argument is without merit. The agents were searching pursuant to a proper warrant. "[A] warrant that authorizes an officer to search a home for [evidence] also provides authority to open closets, chests, drawers, and containers in which the [evidence] might be found." United States v. Ross, 456 U.S. 798, 821 (1982). The warrant specifically provided that money stolen from the banks was a target of the search. It was reasonable for the

agents to suspect that the money might be in the safe. The agents had a valid search warrant that allowed them to search the premises, and also permitted them to open the safe. The evidence found pursuant to the search warrant was properly admitted.

Three witnesses, Carol Brunton, Richard Baker, and Tamarah Weiner, identified defendant from a photo array. A fourth witness, Linda Gray, did not identify defendant from the photo arrays, but did identify him in the courtroom. Defendant contends that the photo arrays were improper because the witnesses were shown them several times, and also because they were used instead of a line-up even after defendant was arrested. Defendant also claims that Gray's in-court identification was

improperly admitted when she could not identify him in the photo array.

In his challenge of the photo arrays, defendant offers no evidence that the agents made any improper suggestions to the witnesses. It is not improper to show a photo array to a witness more than once. The circumstances surrounding the identifications, including the in-court identification, were not improper. The identifications were therefore properly admitted. "[T]he government is not required to conduct a line up" instead of a photo array. United States v. Causey, 834 F.2d 1277, 1286 (6th Cir. 1987). Finally, Gray's in-court identification was properly admitted even though she had been unable to identify the defendant in a photo array.

The failure of the witness to previously identify the defendant goes only to the reliability of her testimony, not to its admissibility. Id. Defendant had the right and opportunity to challenge the reliability of the testimony on cross-examination and closing argument. The reliability of the testimony is a determination to be made by the jury, not by this Court.

Under the confrontation clause, defendants must have sufficient opportunity to cross-examine the prosecution's witnesses. "The district court, however, must be afforded wide discretion to restrict the scope of cross-examination." United States v. Faymore, 736 F.2d 328, 334 (6th Cir.), cert. denied, 469 U.S. 868 (1984). Defendant did cross-examine the

prosecution's witnesses about the possibility of misidentification. Specifically, defendant's counsel cross-examined one witness about her identification of another person, Bernard Turner, as one of the robbers. The evidence of the possible involvement of Turner was presented to the jury. The only questioning that the District Court prevented concerned the fact that charges had been brought against Turner and had been dropped. Defendant claims that the jury was therefore deprived of critical information.

The jury, however, was provided with the information concerning the witness' identification of Turner as one of the robbers. The District Court did not allow questioning about the dismissal of the charges against Turner

because it determined that it was irrelevant. Even if that questioning was improperly excluded, the exclusion was harmless. Further information about the charges against the third party were not necessary for the jury to determine whether defendant had committed the robbery.

Finally, the defendant claims that there was insufficient evidence to convict him. The standard of review in determining the sufficiency of evidence is well established.

> [T]his court must determine whether viewing the evidence and all reasonable inferences in the light most favorable to the government, a reasonable trier of fact could find evidence establishing each element of the crime beyond a reasonable doubt.

United States v. Wood, 780 F.2d 555, 557 (6th Cir.) (per curiam), cert. denied, 475 U.S. 1111 (1986).

Several witnesses identified the defendant as the robber, and money taken from the bank was found at the defendant's home. The defendant contends that the witnesses were mistaken in their identification, and that another person put the money in his safe. The jurors, however, chose not to believe defendant, and it was reasonable for them to do so. There was sufficient evidence to find that defendant had committed the robbery.

The District Court is accordingly AFFIRMED.

No. 90-3072

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	O R D E R
	)	
DANIEL DWAYNE LEWIS,	)	
	)	
Defendant-Appellant	)	

BEFORE: KENNEDY and GUY, Circuit Judges; and BROWN, Senior Circuit Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

LEONARD GREEN, CLERK